IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 219 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ALLARAKHA NURMOHMAD & Ant.: Appellants.

Versus

SWARUPCHAND DALICHAND : Respondent.

Appearance:

MR SURESH M SHAH for appellants.

MR DD VYAS for Respondent.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 28/04/2000

JUDGEMENT

This appeal is directed against the judgment and decree dated 1st March 1982, passed by the then learned District Judge at Bhavnagar in Regular Civil Appeal No. 92 of 1981 on his file dismissing the appeal and confirming the decree dated 31st August 1981 passed by the then learned Civil Judge (J.D.) at Sihor in Regular Civil Suit No. 49 of 1978 directing the present appellants to hand over vacant and peaceful possession of the suit room situated at Sihor and described in Para 7

of the plaint.

2. The facts, which led the present appellant (original-defendants) to prefer this appeal, may, in brief, be stated. The appellant No.1 is the husband of appellant No.2. The respondent is the owner of a house situated in Kuvarwala Nehra at Sihor. There is a room in the compound where the house is situated, which will be hereinafter referred to as the `suit room'. The appellant No.2 was employed as maid-servant by the respondent without any salary, but in turn the appellant No.1 was permitted to use and occupy the suit room without charging rent or any other consideration. The suit room was thus given for use and occupation free of charge. The appellant No.2 left the household work for which she was engaged in the month of March 1977. The respondent, therefore, asked the appellants to vacate the suit room and hand over the possession thereof. The appellant No.1, to whom the suit room was given, did not vacate. Hence a notice on 10th May 1977 was given revoking the licence but after the service of the notice the appellant No.1 paid no heed and avoided to vacate the suit room. Initially, the appellant No.1 had not accepted the notice and therefore another notice on 16th December 1977 by Registered Post was given. As the appellants did not vacate the suit room, the respondent was constrained to file Regular Civil Suit No. 49 of 1978 in the Court of the Civil Judge (JD) at Sihor for realization of possession of the suit room.

3. The appellants, after being served with the summons, appeared before the Court of the Civil Judge (JD) at Sihor and resisted the suit filing the written statement at Ex.11. They contended that appellant No.2 worked as maid-servant at respondent's place without any salary from the Kartik Sud-1 of Samvat Year 2021 (..-64) and hence the suit room was given to them in consideration of the services rendered by the appellant No.2. It was agreed at that time that appellant No.2 if worked as maid-servant for about 10 years without any salary, appellant No.2 after the expiry of 10 years' period would become the sole owner of the suit room. The appellant No.2 then worked for about 13 years. As per the agreement, she became the owner of the suit room. She left the work in S.Y. 2033 (1976-77). Even though she had rendered 10 years' services, the appellant No.2 was compelled to work although she was not keeping good health. It was also contended in the alternative that the appellant No.2 became the owner by way of adverse possession. The appellants also in written statement pleaded that the suit was barred by the period of

limitation. The then learned Civil Judge (JD) framed necessary issues at Ex.21. Considering the evidence on record, he held that the appellants were not in possession of the suit room as the owners, but they were in possession of the suit room because the same was given to them for use and occupation in consideration of the services to be rendered by appellant No.2 as maid-servant. The notice given was legal and valid. The suit was within the period of limitation. He then found that when the licence was terminated the respondent was entitled to possession of the suit room. He therefore passed the decree on 31st August 1981 directing the appellant to hand over peaceful and vacant possession of the suit room to the respondent.

4. Being aggrieved by such judgment and decree,the appellants preferred Regular Civil Appeal No. 92 of 1981 in the District Court at Bhavnagar. The then learned District Judge held that respondent was the owner of the suit room but considering the case put up by both the parties he held that the appellant No.2 was the service tenant. The appellants were therefore entitled to retain the possession which was coextensive with the duration of the services for which appellant No.2 was employed. Under Section 13(1)(f) of the Bombay Rent Act, the landlord was entitled to recover the possession of the premises let to the service tenant, if the tenant was no more in the employment or his services were terminated. In that case, the tenant would cease to be the tenant and he would have to vacate the premises given as service tenant. The appellant No.2, in the case on hand, was the tenant because of the employment and appellant No.1 was not the licensee. However, the learned Civil Judge (JD) was right in passing the decree because the appellant No.2 had ceased to be the tenant soon after she left the work and stopped to render the services as maid-servant. The learned District Judge therefore keeping in mind Section 13(f)(1) of the Bombay Rent Act, confirmed the decree passed by the learned Civil Judge (JD) and dismissed the appeal on 1st March 1982. It is against that decree, the present second appeal is filed.

5. As per Section 100 of the Civil Procedure Code, the second appeal is maintainable if it involves substantial question of law. If it involves question of fact and the lower appellate court has made any mistake in that regard, it would not be open to the aggrieved party to prefer the second appeal, and even if that is preferred, the same cannot be entertained. Keeping such law in mind, the learned advocate representing the appellant contends that when the learned District Judge

found that the relations between the parties were not that of licensor-licensee but were that of landlord-tenant, he ought to have abstained from passing the decree because the suit was filed in the Civil Court under Section 9 of the Civil Procedure Code and was not filed in the Rent Court under Section 28 of the Bombay Rent Act. The learned District Judge, in view of the matter, ought to have directed the respondent to initiate appropriate proceeding in the Rent Court, but when that is not done this Court can in Second Appeal pass the said order. As the Civil Court was not competent and consequently the appellate Court exercising the powers of the Civil Court in appeal was not having different powers than what the Civil Court was having, the decree passed by the appellate Court was bad in law as the suit was not filed in the Rent Court under the Rent Act. The learned District Judge ought to have directed the respondent to file a suit in the Rent Court instead of confirming the decree. As that is not done, the learned District Judge can be said to have acted beyond his competence. In the appeal therefore the question qua competence of the District Judge is involved which is certainly the substantial question of law.

6. Against such contention, Mr. Vyas, the learned advocate representing the respondent, submits that it would not be necessary for this Court to direct the respondent to initiate appropriate proceeding in the Rent Court under the Bombay Rent Act because the learned District Judge has transgressed his jurisdiction in holding that the appellant No.2 was the service tenant and when tenancy came to an end because she left the services or stopped to work, appellants were entitled to vacate. Neither of the parties had come forward with the case of tenancy under the Bombay Rent Act. The respondent alleged the case of licence and not of lease and the appellants filing the written statement did not come forward with the case of lease. They came forward with the case of their having become the owners by the expiry of the period of 10 years, and in the alternative by way of adverse possession. Of course, their such plea is not acceptable and cannot find favour for want of sufficient evidence on record, but the learned District Judge has made out a new case of tenancy though neither of the parties pleaded the same. When the learned District Judge has thus made out a new case, the same has to be negatived by this Court and confirming the finding of the learned Civil Judge, maintained the decree dismissing this appeal.

7. Mr. Shah, the learned advocate representing the

appellant, at this stage, in reply, contends that when cross-objections against the finding regarding the tenancy given by the learned District Judge are not filed, it is not open to the respondent to challenge the finding of the learned District Judge regarding the service tenancy. With no option the respondent has to accept that finding and face the consequences.

8. In view of R.22, O.41 Civil Procedure Code, it is open to the respondent though he may not have appealed from any part of the decree to challenge the finding given against him by the court below which he could have raised by way of appeal or filing the cross-objection against the appeal by the other side. As the rule is very clear, it is not necessary to cite any pronouncement of the Supreme Court, but suffice it to state that the Supreme Court has, in the case of Ravinder Kumar Sharma Vs. State of Assam And Others - (1999) 7 Supreme Court Cases 435, has made it clear that if the aggrieved party has filed the appeal against the decree, it is open to the respondent to challenge the findings given against him in the appeal though cross-objections are not filed by him in the appeal. It is, therefore, open to the respondent though he has not filed any cross-objection to challenge the findings of the learned District Judge regarding service tenancy and thereby holding appellant No.2 to be the tenant, but I may add that though it is permissible to the respondent to challenge the finding rendered against him in appeal filed by the other side without filing the cross-objection, the challenge to the finding in second appeal must be subject to the limitations prescribed by Section 100 of the Civil Procedure Code. In other words Rule 22 Order 44 has to be read along with Sec. 100 for harmonious construction. Sec. 100 does not permit to raise all or every question of law or fact. Section 100 permits the second appeal only if substantial question of law is involved. Hence if the respondent in second appeal wants to challenge the finding rendered against him even without filing the cross-objections, the said challenge must involve a substantial question of law. If it does not involve the substantial question of law but involves a question of fact, it would not be open to challenge the finding resorting to O. 41 R. 22, Civil Procedure Code even on the ground that the finding is erroneous or perverse on the face of record.

9. The duty of the Court is to confine itself within the rival cases pleaded by the parties and issues that arise for determination. It cannot transgress beyond it and pass or refuse to pass the decree creating a new case

by ingenious interpretation or otherwise which is not at all pleaded by either of the parties and for which no issue is sought and no evidence is led. If the court overlooking such duty transgresses its jurisdiction, the same would amount to giving rise to a substantial question in second appeal and if the said finding is sought to be challenged by the respondent even without filing the cross-objection,it would be open to challenge. Hence the respondent in this appeal cannot be prevented from so doing.

10. When the material or relevant evidence is not considered, which if considered would have led to a different conclusion, or where the appellate court has arrived at a particular finding by placing reliance on inadmissible evidence or creating a new case, which if the same was omitted another conclusion was possible, the same would amount to substantial question of law and the same can be inquired into in the second appeal.

11. In the case on hand, as stated above, it is clear that neither of the parties has come forward in his pleadings with a case of tenancy or a case of lease. The respondent-plaintiff alleged the case of licence and the appellant came forward with the case of ownership because of the expiry of 10 years period or in the alternative by way of adverse possession. Though neither of the parties has pleaded the case of the lease or relationship of landlord and tenant between the two, the learned District Judge has made an attempt to make out a new case giving a different shape to the facts alleged and to an extent misconstruing the evidence on record on the basis of a reasonable guess work or conjectures. In short, the learned Judge has made out a new case of tenancy, transgressing his jurisdiction though neither of the parties pleaded the same. His such finding, involving substantial question of law, can be challenged in second appeal because a jurisdictional question or a question of competence of lower court is involved and the said is permissible under Section 100, Civil Procedure Code. When that is so, it is open to the respondent to challenge the finding regarding tenancy involving the substantial question of law, though the cross-objections are not filed.

12. The findings of the learned District Judge, regarding the service tenancy, being foreign to the pleadings of both the parties and arbitrary, inconsistent interpretation of the facts on record are required to be quashed and set aside because no court has a jurisdiction

to make out a new case than what has been pleaded by the parties about which i.e., case pleaded the evidence is led. The said finding is, therefore, required to be quashed and set aside and the respondent in this case is not required to be directed to initiate appropriate proceeding under the Rent Act in the Rent Court, as contended.

13. If the findings about the service tenancy are quashed, the decree passed by the learned Civil Judge (J.D.) at Sihor, will have to be maintained with the findings he has given, because the case of licence is established, and when the licence is revoked giving the notice, the licensee has to vacate the premises and hand over the same to the licensor, i.e., the owner of the premises. In this case, case of adverse possession is not established and ownership of the respondent is not at all shaken by the facts and materials on record, about which both the courts are consistent and before me no submission is made in that regard by either of the parties. The licence granted to use and occupy the suit room when terminated, the appellants are liable to vacate the suit room. On this count, therefore, the decree passed by the learned Civil Judge (JD) deserves to be maintained, but not on the reasonings given by the learned District Judge.

14. For the aforesaid reasons, this appeal, filed by the appellants, is liable to be dismissed and is accordingly dismissed, with costs. The decree passed by the learned Civil Judge (JD) at Sihor is maintained.

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(rmr).